TRENGGANU BUS CO. SDN. BHD.

v.

TRANSPORT WORKERS UNION

HIGH COURT MALAYA, KUALA LUMPUR
HASHIM YEOP SANI J
[ORIGINATING MOTION NO. 42 OF 1981]
23 OCTOBER 1981

LABOUR LAW: *Collective agreement - Interpretation by Industrial Court under s. 33 of the Industrial Relations Act 1967 - Whether Industrial Court acted in excess of jurisdiction - Whether there was breach of the rules of natural justice - Whether irrelevant matters considered - Sections 33A, 33B, 33(2), (4) Industrial Relations Act 1967.*

This was an application by the applicant company for an order of *certiorari* to quash Award No. 147/80 which was obtained under a joint application by the parties pursuant to s. 33(1) of the Industrial Relations Act 1967 (the Act). Section 33 empowered the Industrial Court to vary the terms of an award if it considers it **desirable to do so**, but the variation had to be **solely** for the purpose of removing any ambiguity or uncertainty. An award so varied would thereafter remain binding on the parties.

The present application was rooted in Award 88/76 (the original award) which was handed down from a reference under s. 23(2) of the Act between the applicant company and the respondent union. The award dealt with numerous provisions relating to the wage structure and benefits. Particular reference was made to Item 14 which stated that retirement benefits should apply to retirements (not including dismissal), medically boarded out and death. The Industrial Court ordered that the other benefits should be made effective from 1 July 1976 and the award **as a whole** was to endure for **3 years** until 30 June 1978.

When the original award was jointly referred for interpretation under s. 33 of the Act, the areas of dispute were on the implementation of Item 14 of the original award itself and whether the original award continued to have force and effect even after the expiry date.

At the conclusion of the hearing, the Industrial Court by Award 147/80 held that in the absence of a **continuation clause** in a collective agreement, the *status quo* as between the parties is maintained from the date of expiry of the agreement until a new collective agreement is concluded between the parties. Accordingly, since the parties had already entered into a new collective agreement effective from 1 September 1979 for 3 years, the applicant company was ordered to make payments of the gratuity under Clause 14 of the original award to the 18 employees referred to in Exh. U1 until 1 September 1979 if the same had not been paid by the applicant company. Regarding the second issue, the Court decided to abide by the ruling made in the previous award.

The present application to quash Award 147/80 was made under s. 33 of the Act. The amended s. 33A provides that any party may apply to the Industrial Court to refer an award to the High Court on a question of law. The applicant company had applied to the Industrial Court under s. 33A on 9 January 1981 and simultaneously filed a notice of motion in the High Court for leave to apply for *certiorari* on 10 January 1981. Leave was obtained only on 22 April 1981 by which time the Industrial Court had already made an order on 12 March 1981 refusing the application to refer the questions to the High Court.

In the present application, the applicant company alleged that the Industrial Court: (i) went beyond jurisdiction under s. 33 of the Act which requires the Industrial Court merely to interpret; (ii) committed breach of the rules of natural justice in denying the applicants the right of hearing on Exh. U1; and (iii) took into consideration irrelevant matters in coming to its decision, namely the award of the Industrial Court in another completely different matter.

The question that arose was whether the applicant was entitled to make the present application under s. 33 in view of its failure to obtain an order from the Industrial Court under s. 33A of the Act to refer the same questions of law to the High Court and if the applicant was entitled to proceed in the present application, whether the application had merits.

Held:

[1] Section 33B provides that any award, decision or order including one under s. 33A shall be final and shall not be challenged in any Court. Despite the finality clause, such decision may still be reviewed to ascertain if it was made without or in excess of jurisdiction. The present application did not seek to quash the decision of the Industrial Court under s. 33A. Instead it sought to quash Award No. 147 of 1980 which was an "interpretation award" made under s. 33. It was not the intention of statute to allow an applicant to quash an order of the Industrial Court under s. 33 of the Act.

[2] *Certiorari* being a discretionary remedy, the Court in granting or refusing an application for *certiorari* is entitled to consider not only the conduct of the applicant but also the circumstances of the case.

[3] The Industrial Court did not act in excess of jurisdiction under s. 33 of the Act by merely setting out its interpretation of Clause 14 of the original award and ordering the 18 employees to be paid accordingly. This order of the Industrial Court is authorised by s. 33(2) of the Act. Subsection (4) of the same section also provides that the decision of the Court under that section shall be binding on the parties in the same manner as the original award.

[4] There is no truth to the allegation of the applicant company that there was a breach of the rules of natural justice when the Industrial Court relied on Exh. U1 without giving an opportunity to the applicant company to challenge the document because at no time was there any objection or dispute when the exhibit was tendered.

[5] Award 142 of 1980 relied on by the Industrial Court is a public document and the Industrial Court was entitled to consider the ruling made by the President in the award which was wholly logical. It is immaterial whether there is an express clause stating that collective agreement shall continue after the expiry date until replaced by a new collective agreement. This must be necessarily implied. The primary purpose of the Industrial Relations Act is to introduce and sustain a condition of industrial harmony and it would be illogical to construe that a collective agreement ceases to operate on a certain date expressed in it and thereafter return to a condition of discord in the relationship of the parties concerned.

[6] The original award in this case was legally valid and binding on the parties before and after the expiry date until such time that a fresh award or collective agreement supersedes the collective agreement or any thereof.

[Application dismissed with costs.]

Cases referred to:

New Zealand Waterside Workers Industrial Union of Workers v. Deputy Judge Dalglish and Members of the Waterfront Industry Authority [1949] NZLR 783

L. Stanley v. G.B. Bull [1952] MLJ 65

Legislation referred to:
Industrial Relations Act 1967, ss. 23(2), 33, (1), (2), (4), 33A, 33B

For the applicant - D. Xavier; Sethu, Ghazali & Gomez
For the respondent - K. Chandra; K. Chandra

JUDGMENT

Hashim Yeop Sani:

The applicant company is unhappy about Industrial Court Award No. 147/80. This award was handed down on 10 December 1980 as a result of a joint application by the parties under s. 33(1) of the Industrial Relations Act 1967.

Under s. 33 of the Industrial Relations Act 1967, the Industrial Court may vary any terms of an award if it considers it **desirable to do so,** but the variation however, must be **solely** for the purpose of removing any ambiguity or uncertainty. An award so varied would become once again binding on the parties.

To get our perspective right it is necessary to go back to the original award and the subsequent application for interpretation under s. 33 of the Act. The original Award No. 88/76 was the result of a reference under the then s. 23(2) of the Act between the applicant company and the respondent union. The award handed down after the hearing dealt with numerous provisions relating to wage structure and other benefits like annual leave, public holidays and bonus. Item 14 of the original award dealt with retirement benefits for various types of employees according to the years of service put by the employees. It is also specifically mentioned in the said Item 14 that the retirement benefits should apply even under the following circumstances namely, resignations (not to include dismissal) medically boarded out and death. At the conclusion of the award the Industrial Court ordered that the other benefits should be made effective from 1 July 1976. It was also ordered that the award **as a whole** was to endure for **3 years** until 30 June 1978.

When the original award was jointly referred for interpretation by the parties to the Industrial Court under s. 33 of the Act it was expressly stated that the following areas of dispute on the interpretation of the award were to be resolved by the Industrial Court namely:

1. The contention of the company that any worker retiring on attaining the age of 55 years after the expiry of the Award should not be entitled to any retirement benefits.
2. The contention of the company that any worker resigning not to avoid dismissal before and after the handing down of the award should also not be entitled to claim the retirement benefit as stipulated in clause 14 of the Award.
3. The contention of the union that the award in question was legally valid and binding on both parties even before and after the expiry date i.e. 30 June 1978 until such time a fresh award or collective agreement supersedes the existing award or collective agreement or any par thereof.

It can be seen that there were really two areas of dispute for interpretation by the Industrial Court. The first area of dispute was on the implementation of Item 14 of the original award itself.

The second area of dispute was whether the original award continued to have force and effect even after the expiry date.

After scaring the joint application under s. 33, the Industrial Court handed down Award No. 147 of 1980 on 10 December 1980 which is the subject of the present application. The award clearly indicates at p. 2 of the award that the hearing in the Industrial Court was confined to submissions over the meaning of clause 14 of the original award. It dealt at length on this issue until p. 4 of the award. After that the Industrial Court dealt in effect with the second issue and decided to abide by the ruling made in the previous award by the President of the Industrial Court whose reasoning was reproduced in the Award at pp. 4 and 5. The relevant portion read as follows:

> It is now standard practice for collective agreements to be for periods of three years although the parties contemplate many years of association with each other. The reason for the termination of the agreements once every three years is to enable the parties to review their respective positions at periodic intervals and where appropriate to improve the terms of the agreement. Generally, however the terms of an agreement are continued in subsequent agreements unchanged except with regard to the quantum of salaries and allowances. There is, therefore, a large degree of continuity and stability in the relationship between employer and employee. To achieve this purpose the majority of collective agreements contain a clause that notwithstanding the notice to terminate an agreement, the provisions of the agreement will continue to apply until a new collective agreement is concluded. This is because (in most cases) new agreements are not concluded until well after the expiry date of the old agreement due to prolonged negotiations.
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> Unfortunately, such a clause is missing from the agreement in this case. Yet it is clear that the parties intend to continue their existing relationship. There is no suggestion that because the agreement has come to an end the company is closing shop or that the employees are going to walk out of their jobs. We are, therefore, of the view that the absence of a continuation clause does not put an end to the existing relationship between the parties. To hold otherwise would be contrary to public interest as it will create chaos in industrial relations. We accordingly hold that in the absence of a **continuation clause** in a collective agreement, the *status quo* as between the parties is maintained from the date of expiry of the agreement until a new collective agreement is concluded between the parties.
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> In maintaining the *status quo*, it follows that the provisions of the expired agreement will continue to apply to both parties and that neither party is at liberty to unilaterally discontinue the application of any term of the expired agreement. There shall be no exception to this rule except by mutual consent of both parties.

Thus at the conclusion of Award No. 147 of 1980 the Industrial Court ordered that since the parties had already entered into a new collective agreement effective from 1 September 1979 for 3 years the applicant company was ordered to make payments of the gratuity under Clause 14 of the original award to the 18 employees referred to in Exh. U1 until 1 September 1979 if the same had not been paid by the applicant company.

The applicant seeks to quash Award No. 147/80 on various grounds set out in the statement but these grounds can be safely reduced to the following:

1. In making an award directing payment to the 18 workers consequent upon interpretation of the original Award No. 82/76, the Industrial Court exceeded its jurisdiction conferred by s. 33 of the Act.
2. In referring to document U1 the Industrial Court relied on an exhibit which was produced by the respondent without the applicant being afforded any opportunity to challenge the veracity or truth of the document; and
3. Its decision was based on an irrelevant precedent and ruling of the President in Award No. 142 of 1980 which was made in a non-compliance case and not a case involving interpretation.

It can be seen therefore that the applicant is actually alleging that the Industrial Court:

(i) went beyond jurisdiction under s. 33 of the Act which requires the Industrial Court merely to interpret;

(ii) committed breach of the rules of natural justice in denying applicants the right of hearing on Exh. U1 and

(iii) took into consideration irrelevant matters in coming to its decision, namely the award of the Industrial Court in another completely different matter.

In my view there are really two questions to be answered in the present application. First, the application is to quash Award No. 147 of 1980, which was an award under s. 33 of the Act. The question that arises is whether the applicant is entitled to do so in the light of its failure to obtain an order from the Industrial Court under s. 33A of the Act to refer the same questions of law to the High Court. Secondly, if the applicant is entitled to proceed in the present application whether the application can succeed on the merits.

After the amendment to the Act with effect from 30 May 1980 the new s. 33A provides that any party may apply to the Industrial Court to refer an award to the High Court on a question of law which arose in the course of the proceedings and the determination of which had affected the award.

The applicant company made an application to the Industrial Court under s. 33A on 9 January 1981. This application was subsequently heard by the Industrial Court and the order refusing the application was handed down on 12 March 1981. Almost simultaneously with the application under s. 33A the applicant company also filed in the High Court notice of motion for leave to apply for an order of *certiorari* on 10 January 1981. Leave was, however, obtained only on 22 April 1981.

Thus on the facts it is clear that when leave was granted on 22 April 1981 and the notice of motion was taken out on 23 April 1981 the Industrial Court had already made an order under s. 33A of the Act refusing the application to refer the questions to the High Court. The questions which are the subject of the present notice of motion are substantially the same as the questions referred to in the application under s. 33A of the Act earlier.

Section 33B provides that any award, decision or order of the Industrial Court including a decision whether to grant or not to grant an application under s. 33A shall be final and conclusive and shall not be challenged in any Court. But it is settled law that despite the finality clause such decision may still be reviewed to ascertain if it was made without or in excess of jurisdiction. However it must be noted that the present application does not seek to quash the decision of the Industrial Court made under s. 33A of the Act. Instead it seeks to quash the Award No. 147 of 1980 which was an "interpretation award" made under s. 33 of the Act. I have grave doubt that this is allowed by the Act because the function of the Industrial Court under s. 33 is merely to interpret its own award and to make such variation to the award for the purpose solely of removing ambiguity or uncertainty. This in fact is clearly expressed in the language of s. 33(2) of the Act. In my opinion according to the scheme of the Act it is imperative that some finality must be read into the power of the Industrial Court to interpret its own award. Moreover the Industrial Court itself should be regarded as the most competent authority to interpret its own award. For these reasons it is my view that it is not the intention of the statute to allow an applicant to seek this Court's aid to quash an order of the Industrial Court under s. 33 of the Act.

The conduct of the applicant in the sequence of events referred to earlier is relevant. Certiorari is a discretionary remedy and therefore may be refused not only on the merits but also in the special circumstances of the case. See also *New Zealand Waterside Workers' Industrial Union of Workers v. Deputy Judge Dalglish and Members of the Waterfront Industry Authority* [1949] NZLR 783.

Issue of *certiorari* being discretionary the Court in granting or refusing an application for certiorari is perfectly entitled to consider not only the conduct of the applicant but also the circumstances of the case. This principle is well stated by Wilson J in *L. Stanley v. G.B. Bull* [1952] MLJ 65.

Even assuming that the applicant company is entitled to apply to set aside Award No. 147 of 1980 it is my view that the present application is without merit.

Firstly, I do not think that the Industrial Court acted in excess of jurisdiction under s. 33 of the Act by merely setting out its interpretation of clause 14 of the original award and ordering the 18 employees to be paid accordingly. This order of the Industrial Court is amply covered by the authority of s. 33(2) of the Act referred to earlier. Subsection (4) of the same section also provides that the decision of the Industrial Court under that section shall be binding on the parties in the same manner as the original award.

The second complaint of the applicant company was that there was a breach of the rules of natural justice when the Industrial Court relied on Exh. U1 without giving an opportunity to the applicant company to challenge the document. From a look at the award itself and the affidavit filed on behalf of the respondent dated 4 September 1981. I do not think this allegation of the applicant company is true at all because it seems clear that at no time was there any objection or dispute when the exhibit was tendered.

Finally, the allegation that the Industrial Court followed an irrelevant precedent in Award No. 142 of 1980 cannot likewise be accepted. The award relied on was an award of the Industrial Court which is a public document and the Industrial Court was perfectly entitled to consider the ruling made by the President in the award. In any case I find a lot of logic in the ruling of the President in the award. To my mind it is immaterial whether there is an express clause stating that collective agreement shall continue after the expiry date until replaced by a new collective agreement. I think this must be necessarily implied. The primary purpose of the Industrial Relations Act is to introduce and sustain a condition of industrial peace and harmony and it would be against all logic to construe that a collective agreement ceases to operate on a certain date expressed in it and thereafter there is a return to a condition of discord and disharmony in the industrial relationship of the parties concerned.

The contention of the respondent is the correct interpretation and that is that the original award in this case was legally valid and binding on the parties before and after the expiry date until such time that a fresh award or a collective agreement supersedes the collective agreement or any thereof.

For the above reasons the application is dismissed with costs.

Also found at [1982] CLJ 126